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No. 1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

KNIGHT-MORLEY CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner Knight-Morley Corporation respectfully requests that the Court reconsider, and upon reconsideration grant, the petition for certiorari which it has, by its order of June 23, 1958, denied. In support of this petition for rehearing, petitioner respectfully shows the following:

1. The petition for certiorari heretofore filed in this case asserted, as the principal basis upon which the writ should be granted, the conflict between the position taken by the court below, on the one hand, and the Courts of Appeal for the Fifth and Seventh Circuits in *National Labor Relations Board* v. *American*

Manufacturing Co., 203 F.2d 212 (5th Cir., 1953) and *National Labor Relations Board* v. *Kohler Co.*, 220 F.2d 3 (7th Cir., 1955), on the other. The issue on which those courts are in disagreement is whether Section 502 of the Labor Management Relations Act* changed the usual rule—that it is not an unfair labor practice to discharge employees who leave their work, without striking, in order to put pressure on an employer to change their working conditions (see *C. G. Conn, Ltd.* v. *National Labor Relations Board*, 108 F.2d 390 (7th Cir., 1939); *International Union, U.A.W.A., A.F. of L., Local 232*, v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 257)—and made the protection of Sections 7 and 8(a)(3) of the Act applicable to such employees if, without striking, they left their work in order to compel an employer to remedy a condition of employment which they believed abnormally dangerous. The Board itself had strongly urged in the *Kohler* case that Section 502 of the Act did *not* have that effect (Brief, Nos. 11272 and 11283, filed in the Court of Appeals for the Seventh Circuit, December 16, 1954, pp. 29-32) and the Court of Appeals for the Seventh Circuit agreed, not even adverting in its opinion to the argument by the Board or to the extended argument of the employees to the contrary. Yet, that is the position which in the present case the Board characterized as "illogical and unreasonable" (R. 497a), and which was expressly rejected by the court below (Pet. App., p. 8a).

2. Be that as it may, the emphasis in the petition on this conflict of decisions occupied so large a portion

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* Act of June 23, 1947, 61 Stat. 136, 162, U.S.C., Title 29, Sec. 143.

of the petition (pp. 15-22) that a further, also significant, holding of the court below was treated so summarily (pp. 22-23) as to warrant the belief that it may not really have been presented at all within the meaning of Rule 58(2) of this Court. Even on the assumption, to which we are reluctantly forced, that the conflict of decisions on the effect of Section 502 does not warrant review by this Court, we believe that this further point, not in reality presented in the petition, justifies a review by this Court.

3. Summarily stated, the issue is whether the Labor Management Relations Act, properly construed, permits a union to subvert the grievance machinery established by a collective bargaining contract. More specifically: the doctrine has been long and well established that an employer does not refuse to bargain in violation of the duty imposed by Section 8(a)(5) of the Act by insisting that grievances be handled in the manner provided in the grievance procedure of a contract, rather than made the subject of collective bargaining *dehors* the contract. *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 161 F.2d 949 (6th Cir., 1947); *National Labor Relations Board* v. *Standard Oil Co.*, 196 F.2d 892 (6th Cir., 1952); *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955); *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930 (1954); *Crown Zellenbach Corp.*, 95 N.L.R.B. 753 (1951); *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694 (1943). As the court put it in the *Timken* case (at p. 955): "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement."

In the present case, the Board found petitioner's refusal to bargain concerning the discharge of the 17 buffers to be in violation of Section 8(a)(5), holding

that the *Timken* doctrine was inapplicable to the controversy over their discharge because the contract with the union had expired (R. 505a). The court below properly concluded that the expiration of the contract was irrelevant (Pet. App. A., p. 92), but nonetheless affirmed the decision of the Board, reached on the completely opposite premise, that the strike of September 30 (see Pet., pp. 10-11) was an unfair labor practice strike.

There can be no doubt that the discharge of the buffers was within the grievance machinery; it had, in fact, been partly processed through that machinery (R. 219a, 258a-259a), and that the Company's position was that it should remain there and not become a matter for collective bargaining. Nor can there be doubt that the strike was called to force the Company to change its position on this matter. The statement of the Board (R. 500a) that the strike was caused in part by the discharge of the buffers is no more than a misleading converse of the more accurate statement that the strike resulted because of the Company's proper insistence that its action with regard to those employees be handled as prescribed by the contract.

The significance of the decision, therefore, is this: Under the decision below, an employer who insists upon compliance by a union with the grievance machinery of the contract, as he properly may under the *Timken* case, is nonetheless at the mercy of the union, since a strike called to force the employer to change his position is an unfair labor practice strike. The *Timken* doctrine should not thus be put at the mercy of any union which is willing to strike to subvert it. The decision below, which sanctions that result, should be reviewed by this Court.

4. Concentration in the original petition on the conflicting applications of Section 502 by the several Courts of Appeal led counsel not only to the abbreviation of the matters just discussed, but also to the complete omission of a further aspect of the decision below which warrants review by this Court—the refusal by the court below to apply the six-months statute of limitations contained in Section 10(b) of the Act.

Neither the charge nor the amended charge in the present case (R. 4a, 8a), both of which were filed within six months after August 31, 1953, when the 17 buffers left their work, contain even a suggestion that the union—the charging party—believed that Section 502 of the Act was involved in the case in any way whatever. The original charge referred to the buffers only in connection with an allegation that petitioner had refused to arbitrate their discharge (R. 5a); the amended charge referred to them only in the statement that they had been discharged for "concerted activities in attempting to obtain correction of a faulty blower system" (R. 9a). Indeed, after investigation of these charges by the Board, the latter's original complaint not only made no reference to Section 502, but in fact made no mention of the buffers whatever (R. 12a-17a). It was not until July 30, 1954—eleven months after the events in issue—that the Board, by Paragraph XI of its amended complaint (R. 23a), for the first time in the entire proceeding, suggested that there was a "good faith belief" in the existence of "abnormally dangerous conditions of work." To further aggravate the disparity between the charges and the unfair labor practice of which petitioner has been found guilty, we can add that the excessive heat, which is the principal basis upon which the Board rested its conclusion

of abnormal danger (see R. 492a), was not even made a basis for complaint until midway in the hearing, when the expert witness for the Board, Dr. Frederick, substantially eliminated the complaint as to dust and lint by testifying that, except after years of exposure, they would result in nothing worse than a sore throat (R. 492a; 292a-293a).

Giving full recognition to the fact that a charge is not a pleading, and is not to be construed as such (*National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18), the approach by the court below to the requirement that the charge must be filed within six months renders that requirement virtually meaningless. When neither the charge, nor the complaint originally issued upon the charge, even so much as hinted at dangerous working conditions or a possible application of Section 502, the court below is simply flying in the face of reality when it asserts (Pet. App. p. 6a) that petitioner, by the charge, "certainly had notice of the union's complaint as to conditions in the buffing room and, of course, had notice of the application of Section 502 to this situation."

CONCLUSION

Petitioner, a small business, is faced with a huge back-pay liability which may be so far beyond its financial capacity as to drive it to bankruptcy. It is in that position because for the first and only time, so far as we have been able to ascertain, Section 502 has been held to expand, in measurable degree, the application of Sections 7 and 8(a) of the Act—a position which had previously consistently been rejected by the courts, and, indeed, by the Board itself. Section 502, as construed by the court below, becomes a section

of the Act of major significance in all labor relations as a means by which to defeat grievance procedures established by contract, particularly when, as here, it may be availed of even as a patent afterthought, and injected into the proceeding many, many months after the employees leave their work. Because petitioner should not be required to suffer those drastic consequences if the decision below is erroneous; because the decision on the applicability of Section 502 is in conflict with decisions in other circuits; because the proper application of that section is a matter of importance in the administration of the Labor Management Relations Act; and because the decision is, in the other respects mentioned above, of significance in the interpretation of other aspects of the Act, the order of this Court denying certiorari warrants reconsideration, and upon reconsideration the granting of a writ of certiorari in this case.

Respectfully submitted,

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JULY 1958

I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to substantial grounds available to petitioner not previously presented.

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CHARLES A. HORSKY